

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

GARY W. WALTERS,

Plaintiff,

vs.

ROBERT A. GARCIA, et al.,

Defendants.

Case No. 2:05-cv-01402-RLH-PAL

**REPORT OF FINDINGS AND  
RECOMMENDATION**

This matter is before the court on plaintiff's failure to comply with numerous court orders, including this court's Order to Show Cause (#49) requiring plaintiff Gary W. Walters to show cause, in writing, no later than February 28, 2008, why a recommendation to the District Judge should not be made that this case be dismissed without prejudice for failure to obey the court's orders, and failure to prosecute.

Having reviewed and considered the matter, the court makes the following findings:

1. The Complaint in this case was filed November 23, 2005 (#1). On February 7, 2007, the Clerk of the Court sent a Notice to Counsel (#28) advising the parties that pursuant to LR 41-1, if no action was taken in this case within thirty days, the Clerk's Office would make application to the court for dismissal for want of prosecution. The notice provided the LR 41-1 dismissal deadline was March 9, 2007.
2. On March 7, 2007, plaintiff Gary Walters filed a Motion for Court for Stay of Proceedings and Continuance Exstending [sic] a Set Calander [sic] Date (#29). The court reviewed the motion and construed it as a request for a continuance and stay. Plaintiff indicated that his claims were meritorious, and that he would obtain "proper legal representation by an [sic] licensed state of Nevada attorney." His motion did not

1 indicate how much time he needed. The court's Order (#30) gave the plaintiff until  
2 April 16, 2007 in which to retain counsel to make an appearance in this action, meet and  
3 confer with opposing counsel, and file a proposed a stipulated discovery plan and  
4 scheduling order. The court's Order (#30) warned the plaintiff that if he was unable to  
5 retain counsel on or before April 16, 2007, he "shall take the necessary steps to  
6 prosecute his claims, or the court will recommend to the District Judge that this matter  
7 be dismissed for his failure to prosecute pursuant to the provisions of Fed. R. Civ. P.  
8 41(b) and LR 41-1."

- 9 3. The court received notice from the United States Postal Service that the court's Order  
10 (#30) which the Clerk of the Court attempted to serve on the plaintiff was returned as  
11 undeliverable. The Clerk's Office served the notice at the address plaintiff originally  
12 provided, but because plaintiff had provided the court with a change of address on his  
13 motion to stay, the court entered an Order (#32) directing the Clerk of the Court to make  
14 appropriate changes on the court's CM/ECF system to reflect plaintiff's new address,  
15 requiring the Clerk to serve a copy of the court's Order (#30) on the plaintiff, and giving  
16 the plaintiff until July 9, 2007 in which to retain counsel to make an appearance in this  
17 action, meet and confer with opposing counsel, and file a proposed stipulated discovery  
18 plan and scheduling order. The court's Order (#32) again warned plaintiff that if he was  
19 unable to retain counsel on or before July 9, 2007, he "shall take the necessary steps to  
20 prosecute his claims, or the court will recommend to the District Judge that this matter  
21 be dismissed for his failure to prosecute pursuant to the provisions of Fed. R. Civ. P.  
22 41(b) and LR 41-1." The court's Order (#32) also required the plaintiff to serve upon  
23 the defendant, or defense counsel, a copy of every pleading, motion, or other documents  
24 submitted for consideration by the court. The order directed that plaintiff include with  
25 any original papers submitted for filing a certificate stating the date that a true and  
26 correct copy of the document was personally served or sent by mail to the defendants or  
27 counsel for the defendants. The order warned the plaintiff that the court may disregard  
28 any paper received by a district judge or magistrate judge which has not been filed with

1 the Clerk, and any paper received by a district judge, magistrate judge, or the Clerk  
2 which fails to include a certificate of service.

- 3 4. Thereafter, the plaintiff requested, and received multiple extensions of time to retain  
4 counsel and file a proposed discovery plan and scheduling order. (See Order (#35)  
5 granting Docket #34, Ex Parte Motion for Extension of Time to Comply with June 16,  
6 2007 Order of the Court; Docket #37, Order granting Docket #36, Ex Parte Motion for  
7 Time to Comply with June 16, 2007 Order; Order (#40) granting Docket #39, Motion to  
8 Withdraw as Attorney; Order (#43) granting Docket #42, Motion for Extension of Time  
9 for Securing Adequate Counsel to Represent Plaintiff; Order (#46) granting Docket #45,  
10 Request for Extension of Time). Order (#43) gave plaintiff until December 28, 2007 to  
11 retain substitute counsel or file a notice with the court that he would be appearing in this  
12 matter *pro se*.
- 13 5. On December 28, 2007, plaintiff contacted the undersigned's Chambers, indicating he  
14 was at the law firm of John Peter Lee making arrangements for the law firm to represent  
15 him in this action, that the arrangements would be finalized on January 2, 2008, and  
16 requesting a seven-day extension of the court's Order (#43) giving him until December  
17 28, 2007 in which to retain substitute counsel. The faxed copy of the handwritten  
18 request for extension was not served on opposing counsel or filed with the Clerk of the  
19 Court. Chambers reminded Mr. Walters of his obligation to serve opposing counsel with  
20 any requests for relief, and as a courtesy, faxed a copy of the court's docket sheet  
21 reflecting the appearances of all counsel of record to him at the law offices John Peter  
22 Lee.
- 23 6. On January 10, 2008, plaintiff filed another Request for Extension of Time (#45),  
24 indicating that "we" had met with the law firm of John Peter Lee which was willing to  
25 represent him provided a prepaid retainer was received, and that he was "negotiating  
26 with a company from London UK" and expected funds would be available to pay the  
27 attorneys within fourteen days. On the same day, Chambers received a telephone call  
28 from a person purporting to be an attorney who wanted to provide additional information

1 to the court. He was instructed to file something if he wished to have it be considered.  
2 Nothing was filed, but Chambers received a letter via facsimile which purported to be  
3 from the law offices of H. Cy Schaffer making representations about the plaintiff's  
4 financial condition.

5 7. The court entered an Order (#46) giving plaintiff "one **FINAL** opportunity to comply  
6 with the court's orders to either retain substitute counsel or file a notice with the court  
7 indicating that he will be appearing in this matter *pro se*." Plaintiff was given until  
8 January 28, 2008 to retain substitute counsel or file such a statement, and informed that  
9 no further extensions would be allowed. The court also ordered plaintiff to "cease and  
10 desist from contacting Chambers to request any form of relief, and shall file any request  
11 for relief with the Clerk of the Court providing proof of service on counsel for all the  
12 parties." The order warned plaintiff that "**failure to comply fully and completely with  
13 the provisions of this order will result in the recommendation to the District Judge  
14 that this matter be dismissed for his failure to comply with the court's orders, and  
15 failure to prosecute pursuant to the provisions of Fed. R. Civ. P. 41(b) and LR 41-  
16 1.**"

17 8. Plaintiff filed a motion (#48) for a 10-day extension to retain counsel on January 28,  
18 2008. The motion represented that "we have just secured the services of Robert  
19 Weatherford, Esq To represent ourselves in the Court Action," and that "The financing  
20 from the Trafalger Bank has been delayed for Another ten days." No proof of service  
21 was attached to the motion as required by LR 5-1 and by the court's previous orders.

22 9. On February 12, 2008 the court entered an Order to Show Cause (#49). In the order  
23 (#49), the court found that the plaintiff had received numerous extensions of time to  
24 comply with this court's orders to either retain counsel or file a statement with the court  
25 indicating he would be appearing in this matter *pro se*; that he has been repeatedly  
26 warned that his failure to comply with the court's orders and prosecute his claims may  
27 result in a recommendation to the District Judge that his case be dismissed for failure to  
28 prosecute; that plaintiff has also been ordered to file anything he wishes the court to

1 consider with the Clerk of the Court and serve a copy on opposing counsel providing  
2 proof of service; that he has repeatedly failed to comply with these orders; and that the  
3 court gave plaintiff one **FINAL** opportunity to comply with these orders but plaintiff  
4 failed to do so. The court ordered plaintiff to show cause why this action should not be  
5 dismissed for failure to obey the court's orders and failure to prosecute pursuant to the  
6 provisions of Fed. R. Civ. P. 41(b) and LR 41-1, and that failure to timely comply with  
7 the order (#49) would result in the recommendation to the District Judge that this case be  
8 dismissed for failure to obey the court's orders, and failure to prosecute.

9 10. To date, plaintiff has not complied with the court's orders to either retain substitute  
10 counsel or file a notice with the court indicating that he will be appearing in this matter  
11 *pro se*, nor has he shown cause, in writing, why this case should not be dismissed for  
12 failure to obey the court's orders and failure to prosecute pursuant to the provisions of  
13 Fed. R. Civ. P. 41(b) and LR 41-1.

14 11. The court may dismiss an action for failure to prosecute, contempt of court, or abusive  
15 litigation practices. TeleVideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 916 (9th Cir.  
16 1987). Dismissal is proper where the party's conduct is due to willfulness, bad faith, or  
17 fault, and there is a nexus between the misconduct and the matters in controversy such  
18 that the rightful decision of the case is threatened. Anheuser-Busch v. Natural Beverage  
19 Distrib., 69 F.3d 337, 348 (9th Cir. 1995). The court must weigh the following factors  
20 before imposing dismissal: 1) the public's interest in expeditious resolution of litigation;  
21 2) the court's need to manage its docket; 3) the risk of prejudice to the party seeking  
22 sanctions; 4) the public policy favoring disposition of cases on their merits; and 5) the  
23 availability of less drastic measures. Id. Dismissal ensures the integrity of the court's  
24 orders and the orderly administration of justice. Halaco Engineering Co. v. Costle, 843  
25 F.2d 376, 380 (9th Cir. 1988).

26 12. Plaintiff was served with a copy of each of the court's orders requiring him to either  
27 retain substitute counsel or file a notice with the court indicating that he will be  
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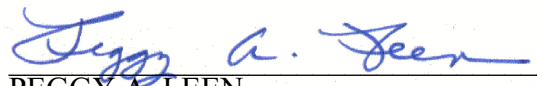
1 appearing in this matter *pro se*, and with the court's Order to Show Cause (#49), and was  
2 given sufficient time to comply with the court's orders.

- 3 13. Plaintiff's willful failure to either retain substitute counsel or file a notice with the court  
4 indicating that he will be appearing in this matter *pro se* and comply with the court's  
5 orders constitutes failure to prosecute and has interfered with the court's ability to hear  
6 this case, delayed litigation, disrupted the court's timely management of its docket,  
7 wasted judicial resources, and threatened the integrity of the court's orders and the  
8 orderly administration of justice. Sanctions less drastic than dismissal are unavailable  
9 because plaintiff has repeatedly refused to comply with multiple court orders and the  
10 Local Rules of Practice. There has been no action taken to prosecute this case since  
11 plaintiff was notified on February 7, 2007 that the Clerk would make application and  
12 dismissal for want of prosecution.

13 Based on the foregoing and for good cause appearing,

14 **IT IS RECOMMENDED** that this case be dismissed without prejudice.

15 Dated this 5th day of March, 2008.

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18 PEGGY A. LEEN  
19 UNITED STATES MAGISTRATE JUDGE  
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